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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 94

L. LITTLEJOHN & COMPANY, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 56–58) is not reported in the Federal Reporter, but is found in 1923 A. M. C. 219.

JURISDICTION

The judgment to be reviewed was entered February 28, 1923. (R. 58.) This appeal was taken May 26, 1923. (R. 61.) The suit was brought to recover losses resulting from a collision between the S. S. *Gaelic Prince* and the Army transport *Antigone*. The District Court sustained the suggestion filed by the United States that the steamship *Antigone*

at the time of her collision with the *Gaelic Prince* on October 9, 1919, was owned by and in the possession of the United States and was then employed in the public service and that by reason thereof she was immune from liability for collision losses. In reaching that conclusion the court held that the Joint Resolution of May 12, 1917, under which the United States acquired title to the vessel, is constitutional; that the Treaty of Versailles confirmed retroactively the acquisition of title by the United States, and that the District Court was without jurisdiction. The District Court certified that it so held. (R. 59–60.) The jurisdiction of this Court is based on Section 238 of the Judicial Code as it stood prior to the Act of February 13, 1925.

THE QUESTIONS

The questions presented are whether the *Antigone* was owned by or in the lawful possession of the United States at the time of the collision, and, if so, whether she was immune from liability for collision losses.

STATEMENT

By authority of the Suits in Admiralty Act of March 9, 1920 (C. 95, 41 Stat. 525), on February 19, 1921, the owners of the S. S. *Gaelic Prince* and of cargo laden aboard her filed libels to recover losses resulting from collision on October 9, 1919, between the *Gaelic Prince* and the Army transport *Antigone*. The libel by hull owners alleged (R. 8) that "at all times hereinafter mentioned the steamship (*Antigone*) was, and it still is, owned and operated by the

United States of America." The libels by cargo owners alleged (R. 12) that the United States of America "owned and operated the steamship *Antigone;*" (R. 3), "the United States of America did own, operate or control the steamship *Antigone.*" These references include the date of the collision as well as the time of filing the libels.

Following the practice it had adopted in *The Western Maid,* 257 U. S. 419, and many other cases, the Government filed its suggestion that the District Court was without jurisdiction for the reason that as the *Antigone,* at the time of the collision, was an Army transport employed by the Government in public service for national uses and purposes, no lien liability attached by reason of the collision and the libels could not be maintained.

Thereupon, plaintiffs amended their libels, which theretofore had pleaded ownership, possession and control of the *Antigone* by the Government at the time of the collision, so as to allege that at the time of the collision, October 9, 1919, the *Antigone* "was owned by a private person or merchant who was solely entitled to the immediate and lawful possession, operation, and control of said vessel" and that four days after the collision the United States came into possession of the vessel and so remained at the time the libels were filed, alleging (R. 19, 20):

> At no time prior to said 13th day of October, 1919, was the said Steamship *Antigone* owned, either absolutely or *pro hac vice* by the United States of America * * * nor lawfully in

the possession of the United States of America * * * nor lawfully operated by or for the United States of America * * *.

On the 13th day of October, 1919 (date of treaty of peace between Allies and Germany) the respondent United States of America became, ever since has been, and now is in the lawful possession of the Steamship *Antigone*, but at no time has the United States of America held the legal title to or been the absolute owner of said Steamship *Antigone*.

The *Antigone*, formerly the German liner *Neckar*, was acquired by the United States by authority of the Joint Resolution of May 12, 1917, entitled "Joint Resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes" (C. 13, 40 Stat. 75), and the Executive Order of June 30, 1917, by authority thereof.[1]

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[1] EXECUTIVE ORDER—Whereas the following joint resolution adopted by Congress was approved by the President May 12, 1917:

"Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of

At the time of the collision the *Antigone*, thus acquired by the Government and in its possession, was operated as an Army transport solely in the transportation of supplies and troops of the United States Army between ports of the United States and England and France. Her status then was that of a public vessel of the United States employed for the national defense.

Exceptions and answer or traverse to the Government's suggestion of want of jurisdiction were filed

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the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole, or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

And whereas the following vessels were, at the time of coming into the jurisdiction of the United States owned in whole or in part by a corporation, citizen, or subject of the Empire of Germany, a nation with which the United States is now at war, or were flying the flag of or under the register of the Empire of Germany, or of a political subdivision or municipality thereof; * * * *Neckar* * * * .

It is therefore ordered that through the United States Shipping Board there be taken over to the United States the possession and title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip and man the said vessels; to operate, lease, or charter the same in any service of the United States, or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth.

(R. 20–22), which denied that the Government by the seizure or appropriation of the *Antigone* under the Joint Resolution of Congress and the Executive Order by authority thereof had acquired either title or lawful possession of the *Antigone* prior to October 9, 1919. It suggested that such title or lawful possession could only be acquired through appropriate prize court proceedings. The District Court (Hough, C. J., sitting) then entered an order requiring the issues raised by the suggestion and traverse to be tried by the court. (R. 23–25.) It handed down a memorandum assigning its reasons for directing the issue. (R. 22, 23.) Proofs were then received. The court (Augustus N. Hand) sustained the Government's suggestion and dismissed the libels. (R. 56–58.)

The Joint Resolution of Congress of May 12, 1917 (R. 45), authorized the President to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof of German ownership or registry. By Executive Order of June 30, 1917 (*supra*), the President declared the *Neckar* (since renamed *Antigone*) to be German-owned, under German registry and flag. He directed the United States Shipping Board to take over to the United States the immediate possession and title of the *Neckar*. Section 2 of the Order directed the Secretary of the Navy to appoint a Board of Survey to ascertain the actual value of the vessel, its equipment and appurtenances, and to preserve such report with the records of the Navy Department.

Pursuant to this authority, the Shipping Board designated one Anthony V. Lynch to take possession of the *Antigone* (R. 43). This he did on July 17, 1917, by proceeding aboard the vessel and formally declaring possession to be taken in the name of the United States (R. 28).

> I affixed the original order by means of a thumb tack to some piece of boarding on board the ship and then recited a formula to the effect that I was taking possession of the ship in the name of the President of the United States and the United States Government. I then removed the original order and put the copy of it, an exact copy, in a frame and attached that frame to the ship.

The return by Lynch appears on pages 43, 44 of the record. Thus possession was secured, and title was acquired under the terms of the Joint Resolution of Congress and of the Executive Order.

The President on May 19, 1917, appointed a Naval board of inquiry (R. 47) which duly appraised the *Neckar* (R. 49). Thus all the conditions stated by the Joint Resolution of May 12, 1917, had been complied with.

By Executive Order certified August 29, 1917, the Shipping Board was directed to transfer the *Neckar* to the Navy Department. (R. 30.) By a formal Navy order dated September 1, 1917 (R. 49, 50), the *Neckar* was renamed the *Antigone*. On September 24, 1919, the *Antigone* was placed out of commission as a Naval vessel and transferred to the Army Trans-

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port Service. (R. 45.) The status of the *Antigone* as an Army transport thereafter and at the time of the collision which happened October 9, 1919, definitely is determined by the affidavit of the Superintendent of Water Transportation of the Army Transport Service (R. 46) which was received in evidence. Counsel conceded that the Superintendent (Major Phipps) would testify to the facts stated by the affidavit (R. 34). This affidavit reads (R. 46):

> That he is a Major in the Coast Artillery Corps, United States Army; that on the 9th day of October, 1919, and prior and subsequent thereto, he was a Colonel in the Coast Artillery Corps of the United States Army and was Superintendent of Water Transportation in the Army Transport Service for the Port of New York; that as such Superintendent of Water Transportation he had charge and control of all of the army transports leaving the Port of New York; that on September 24, 1919, at 3.30 P. M. the United States Navy Transport and Cruiser Force placed out of commission the Navy Transport *Antigone*, transferring the said vessel to the U. S. Army Transport Service; that on that date and at that time he took charge and control of the *Antigone* and placed a master, officers and crew on board the *Antigone*, who were at that time sworn in in the U. S. Army Transport Service; that thereafter on the 9th day of October, 1919, he gave orders to the captain of the Army Transport *Antigone* to sail from the Port of New York and proceed to Brest, France, in order to transport troops from

> Brest to the United States of America; that on October 9, 1919, the United States Army Transport *Antigone* sailed pursuant to such orders and while proceeding down the Ambrose Channel on her way to sea, came in collision with the *SS Gaelic Prince;* that at the time of the collision the U. S. A. T. *Antigone* was an Army Transport in the possession and control of the United States under his supervision and was carrying no cargo except 61 cases, crates (fols. 129 & 130), etc., of household effects consigned to Captain Ivan Jones, Asst. Military Attaché in Berne, Switzerland, and further deponent sayeth not.

From this review, the only conclusion to be reached is that at the time of the collision the *Antigone* was an Army transport in the possession of and operated under the direction of the United States Army Transport Service and assigned to transport troops from Brest to the United States. The collision happened while the *Antigone* in such service was proceeding from New York to Brest. Thus it is determined, as the suggestion of want of jurisdiction declares (R. 18, sec. 5), that at the time of the collision the U. S. A. T. *Antigone* was operated by the United States—

> solely in the transportation of supplies and troops of the United States Army to and from ports in the United States of America to ports in England and France; that the said U. S. A. T. *Antigone* was operated as aforesaid by the United States of America, was navigated and manned by officers and men employed by the United States, and that the said vessel was

allocated by the United States to the United States War Department.

The District Court (Hand, D. J.) found (R. 57, 58) that title to and possession of the *Antigone* at the time of the collision was in the United States, and that the vessel then was engaged in military service (R. 57, 58), and that as such public vessel she was immune from lien liability for collision losses. Accordingly the libels were dismissed.

ARGUMENT

SUMMARY

I. Under the Joint Resolution of May 12, 1917, and the Executive Orders issued thereunder, the United States acquired lawful possession of and title to the Antigone.

II. The Western Maid, 257 U. S. 419, settles the point that as the vessel was owned by or in the lawful possession of the United States and employed in the public service at the time of the collision she was immune from liability.

I

Under the Joint Resolution of May 12, 1917, and the Executive Orders issued thereunder, the United States acquired lawful possession of and title to the Antigone.

When the *Antigone*, formerly the *Neckar*, was seized in 1917 she was enemy owned and the United States had the right of a belligerent to seize, and, if it chose, to confiscate her.

> That war gives to the sovereign full right to take the persons and confiscate the prop-

> erty of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. [*Brown* v. *United States*, 8 Cranch, 110, 122, 123.]

It is settled that the Fifth Amendment to the Constitution of the United States providing that the United States shall not take private property for public use without compensation does not operate to restrict the war power nor protect the property of an enemy from seizure or from confiscation. In *Miller* v. *United States*, 11 Wall. 268, this Court said (pp. 304, 305):

> But if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, they are an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these

> powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right.

The provision of the Constitution (Article I, Section 8) giving Congress power to declare war and to make rules for captures on land and water places in Congress the power to decide whether enemy property shall be seized, and if seized, whether it shall be taken with or without compensation. *Ware* v. *Hylton*, 3 Dall. 199.

By the Joint Resolution of May 12, 1917, authority was granted to the President "to take over to the United States the immediate possession and title" of enemy-owned vessels and that authority was exercised. By this Joint Resolution and in the exercise of the war power Congress decided upon the taking over of title and possession of these vessels but postponed consideration of the question whether compensation should be paid to the German owners. We are not concerned here with the question whether Congress intended that compensation should be paid. It is sufficient for the purposes of this case that lawful possession or title was acquired by the United States.

Among the *German Ship Cases* now pending in this Court (Nos. 102, 103, 108, 109, 110–114, 116–117, 126)

is one (No. 114, *North German Lloyd* v. *United States*) in which the former owners of the *Antigone*, the vessel involved in this case, brought suit to recover her value on the ground that title had been acquired by the United States under circumstances which implied an agreement to pay compensation. The brief in the *German Ship Cases* deals more at length with the Resolution of May 12, 1917.

Under the Resolution of May 12, 1917, the institution of proceedings in a prize court was not necessary to the acquisition of title or lawful possession. The Resolution did not provide for any such judicial proceeding. It authorized the President "to take over the immediate possession and title," a method contemplating prompt action and the avoidance of the delay incident to judicial proceedings.

The legislative history of the Resolution set forth in the Appendix to this brief shows that Congress deliberately refused to adopt any provision for judicial proceedings.

Condemnation proceedings in a prize court are usual in maritime law and are useful in settling titles to vessels against all the world, but such a proceeding may be dispensed with by Congress.

In *The Western Maid*, 257 U. S. 419, 432, it was said:

> In deciding this question we must realize that however ancient may be the traditions of maritime law, * * * it derives its whole and only power in this country from its having

> been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.

Judge Hand in the opinion below said (R. 57):

> It is contended that neither title nor possession in this case could be lawful unless obtained in the course of prize proceedings. We have, however, an Act of Congress passed under the war power. All decisions made under other conditions must yield to this. The terms "immediate possession and title" evidently can not have contemplated proceedings in a prize court. International Law will be enforced in our courts but not in the face of a constitutional act of Congress. I can see no reason why the customary suit in admiralty may [not] be supplanted by direct governmental action if Congress clearly so prescribes.

It is so clear that the United States acquired lawful possession and title of this vessel under the Resolution of May 12, 1917, and the proceedings taken thereunder that consideration of the effect of the Treaty of Berlin is unnecessary.

II

The Western Maid, 257 U. S. 419, settles the point that as the vessel was owned by or in the lawful possession of the United States, and employed in the public service at the time of the collision she was immune from liability.

In *The Western Maid, The Liberty,* and *The Carolinian,* 257 U. S. 419, the Court held that if a vessel was owned by the United States *or* chartered to the United States, and was employed in the public service, no liability could attach to the vessel for a collision occurring while she was so employed which could be enforced even after she had passed into hands that could be sued.

In the present case the vessel was owned by the United States, in the lawful possession of the United States, and was employed in the public service when the collision occurred, ~~and also when the libels were filed.~~ The reasons for the rule stated in *The Western Maid* seem to make that rule applicable to this case, [where the United States, under claim of right, was in possession of and employing a vessel in the public service,] without regard to whether the possession was lawful, or whether the former owner could successfully contest the legal right of the United States to the possession of the ship. That the possession of the United States was lawful is so clearly established that further discussion of this point is unnecessary.

The decision in *The Western Maid* completely disposes of this case.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

IRA LLOYD LETTS,
Assistant Attorney General.

J. FRANK STALEY,
Special Assistant to the Attorney General.

NOVEMBER, 1925.

APPENDIX

1. Legislative History of the Joint Resolution—(Cong. Rec., Vol. 55, Part 2, p. 1572). S. J. R. 42 as originally introduced on April 23, 1917, reads (id. [pt. 1] p. 930).

"*Resolved, etc.*, That the President be, and is hereby, authorized to take over for the United States the possession and title of any vessel, within the jurisdiction of the United States, of any subject or citizen of any nation with which the United States may be at war, and, through the United States Shipping Board or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise, as he may see fit.

"The property rights and claims to compensation, if any, of such subject or citizen shall be determined at the end of the war."

As reported by the Committee on April 30, 1917, it reads (id. 1572):

The SECRETARY. The Committee recommends striking out all after the resolving clause and inserting the following words:

"That the President be, and he is hereby, authorized to take over to the United States the possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States, except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation

.th which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings hereinafter authorized on any claim for compensation.

"Sec. 3. That any person or corporation may institute a suit against the United States of America in the Court of Claims thereof for the recovery of the damages which he may sustain through the exercise of the power herein conferred upon the President. Such damages shall be limited to just compensation for the interest or right of which claimant is deprived by reason of such taking. In ascertaining such compensation there shall be excluded any value added to the vessel by reason of work done or improvements placed thereon by the United States. In order to recover a judgment the claimant must prove that he was the owner at the time of taking of the interest

or right for whose taking he seeks compensation; and that no nation with which the United States may be at war at the time of such taking, or at the time of rendition of judgment, nor any corporation, subject, or citizen of such nation, has any interest, direct or indirect, in such claim, or in the judgment which may be rendered thereon; and that claimant acquired in good faith and for substantial consideration the right or interest, for whose taking he seeks compensation, prior to the commencement of war with the nation whose citizen or subject owned, in whole or in part, the vessel taken, or under the register or flag of which such vessel was at the time of entry into the jurisdiction of the United States; if claimant be a corporation it must also prove that the majority of its stock is not owned by subjects or citizens of a nation with which the United States may be at war and was not so owned at the beginning of such war. If the required facts be established the court shall have power to render judgment for the amount due claimant subject to the right of appeal to the Supreme Court of the United States; but if such facts be not established the court shall render no judgment and shall make a report to Congress stating its findings of fact.

"Sec. 4. The Court of Claims is hereby authorized to make all needful rules and regulations not contravening the laws of the land or terms of this act for executing the provisions hereof.

"Sec. 5. All claims upon which suit may not be instituted prior to the expiration of one year from the date of exchange of ratifications of a treaty of peace with the Imperial German Government shall be forever barred."

This resolution was debated in the Senate (id. 1572-1576), and Sections 3, 4 and 5 were stricken out. (The words "hereinafter authorized" appearing in the last sentence of Section 2 were also stricken out.)

An amendment was offered, reading as follows (id. 1575):

"SEC. 3. That any vessel so seized shall be condemned in any district court of the United States for the district in which the same may be or in any court created by or under the authority of the United States having admiralty jurisdiction over the place at which such vessel may be seized, or into which it may be taken, pending which proceedings for condemnation it may be requisitioned by the United States under order of the court for such use or disposition as is provided for in section 1 of this act.

"No bounty, prize money, bonus, or other gratuity or reward shall be due or be paid to any person on account of the taking or seizure of any of the ships mentioned in section 1 of this act."

This was defeated by a vote of three Yeas and sixty-six Nays.

Further amendment was offered and defeated, reading as follows (id. 1576):

"Whereas the activities of the Imperial German Government in its efforts to destroy the commercial vessels of the United States, its allies, and the vessels of neutral powers creates an immediate emergency and an extreme necessity to at once replenish in a practical way the loss of ships thus sustained: Therefore be it

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States be, and he

is hereby, requested to at once requisition all vessels of alien enemies of the United States in the ports and waters of the United States, or elsewhere found, and to use the same in the prosecution of the war against the Imperial German Government in such trade or manner as will, in his judgment, best subserve the interests of the United States and its allies."

The resolution was passed by the Senate on April 30, 1917. It was considered by the House on May 7, 1917 (id. 1900–1936) and passed without amendment (id. 1936). The debates definitely determine that the Government by Executive action was to take over the immediate title and possession, whether acquired by confiscation or appropriated in the nature of requisition, with the question of compensation later to be determined by the Treaty of Peace or later legislative action. The title and possession acquired by the Government is firm. Further extracts from the Congressional Record relating to the Resolution of May 12, 1917, will be found in the appendix to the brief in the German Ship Cases, No. 102.

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